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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 NATIONSTAR MORTGAGE, LLC,

8 Plaintiff,

2:15-cv-01287-RCJ-NJK

9 vs.

ORDER

10 FALLS AT HIDDEN CANYON
11 HOMEOWNERS ASSOCIATION et al.,

12 Defendants.

13 This case arises from a residential foreclosure by the Falls at Hidden Canyon
14 Homeowners Association (“the HOA”) for failure to pay HOA fees. Pending before the Court is
15 a Motion to Dismiss. (ECF No. 48.) For the reasons given herein, the Motion is granted in part
16 and denied in part.

17 **I. FACTS AND PROCEDURAL BACKGROUND**

18 In October 2005, non-party Gwendolyn L. Farrow obtained a \$256,500 mortgage loan to
19 purchase property located at 1852 Fossil Butte Way, North Las Vegas, Nevada 89032 (“the
20 Property”). Non-party The Bank of New York Mellon (“BNYM”) acquired the note and Deed of
21 Trust (“DOT”) by Corporate Assignment of Deed of Trust recorded March 24, 2010.

22 On January 5, 2011, as a result of the homeowners’ failure to pay HOA fees, the HOA
23 recorded a lien for delinquent assessments. The HOA later recorded a notice of default and
24 election to sell on March 11, 2011, and a notice of trustee’s sale on July 28, 2011. On April 8,

1 2011, BNYM requested, through its agent, a payoff ledger identifying the amount of the
2 superpriority portion of the HOA's lien. The HOA refused to provide the ledger. On November
3 15, 2011, the HOA foreclosed on the Property, acquiring the Property itself for the sale price of
4 \$9,850. The HOA assigned the Property to Defendant Las Vegas Development Group, LLC
5 ("LVDG") by quitclaim deed recorded November 23, 2011. LVDG then quitclaimed its interest
6 in the Property to Defendant Airmotive Investments, LLC. Plaintiff Nationstar Mortgage, LLC
7 ("Plaintiff") alleges it later obtained its interest in the Property from BNYM by a Corporate
8 Assignment of Deed of Trust recorded November 21, 2014.

9 On July 8, 2015, Plaintiff brought this action for quiet title and declaratory judgment,
10 violation of NRS 116.1113, wrongful foreclosure, and injunctive relief. On April 26, 2017,
11 Plaintiff filed a First Amended Complaint ("FAC"). Plaintiff alleges that the HOA's foreclosure
12 sale did not extinguish BNYM's interest in the Property, and therefore the title Plaintiff acquired
13 from BNYM following the foreclosure is superior to any interest held by any Defendant.

14 The HOA filed a motion to dismiss the FAC, which the Court granted on June 14. (Order,
15 ECF No. 41.) On July 14, Plaintiff filed his Second Amended Complaint ("SAC"). The HOA
16 now moves for dismissal of the SAC. Defendants LVDG and Absolute Collection Services, LLC
17 have joined in the motion.

18 **II. MOTION TO DISMISS STANDARD**

19 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the
20 claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of
21 what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47
22 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
23 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
24 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720

1 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
2 failure to state a claim, dismissal is appropriate only when the complaint does not give the
3 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
4 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
5 sufficient to state a claim, the court will take all material allegations as true and construe them in
6 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
7 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
8 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
9 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

10 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
11 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
12 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
13 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
14 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
15 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
16 cognizable cause of action (*Conley* review), but also must allege the facts of his case so that the
17 court can determine whether the plaintiff has any basis for relief under the cause of action he has
18 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review).

19 “Generally, a district court may not consider any material beyond the pleadings in ruling
20 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
21 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
22 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
23 whose contents are alleged in a complaint and whose authenticity no party questions, but which
24 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)

1 motion to dismiss” without converting the motion to dismiss into a motion for summary
2 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
3 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
4 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
5 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
6 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
7 2001).

8 **III. ANALYSIS**

9 **a. Wrongful Foreclosure**

10 The Court previously dismissed Plaintiff’s wrongful foreclosure claim as time-barred to
11 the extent it was based on an alleged violation of statute. (Order 6–7, ECF No. 41.) The Court
12 also dismissed the claim, without prejudice, to the extent it was based on alleged violations of the
13 CC&Rs applicable to Property, because the FAC did not allege that any Defendant failed to
14 comply with the CC&Rs in relation to the foreclosure. In the SAC, Plaintiff has replied its
15 wrongful foreclosure claim, and has simply ignored the analysis in the Court’s order dismissing
16 the FAC. Plaintiff has not attempted to cure the deficiencies in its pleading by adding factual
17 allegations regarding violations of the CC&Rs. For that reason, the Court will again dismiss this
18 claim.

19 However, what is missing from Plaintiff’s pleading appears to be present in its response
20 to the motion to dismiss. For example, Plaintiff argues that the CC&Rs obligated the HOA to
21 “set forth the amount of the unpaid assessment within ten days of a written request of a senior
22 deed of trust holder,” and that prior to foreclosure the HOA actually refused to comply with such
23 a request from Plaintiff’s predecessor-in-interest. (Resp. 8–9, ECF No. 55.) Allegations in
24 response to a motion to dismiss do not equate to allegations in the complaint. The complaint is

1 the governing document in any litigation, and it is the complaint which must contain facts
2 supporting a plausible claim for relief. Under the circumstances, the Court will give Plaintiff one
3 final opportunity to cure the deficiencies in its pleading of the wrongful foreclosure claim.

4 **b. Quiet Title**

5 The HOA next relies heavily on *Ditech Fin. LLC v. Saticoy Bay LLC Series 4683 Califa*,
6 No. 2:17-cv-757, 2017 WL 2871068, at *2 (D. Nev. July 3, 2017) (Mahan, J.), to argue that
7 Plaintiff lacks standing to assert his quiet title claim. The Court respectfully disagrees with the
8 analysis in *Ditech*. A quiet title action is simply a request for a court to declare the rights of the
9 parties as to the title to a piece of real estate. *See Kress v. Corey*, 189 P.2d 352, 364 (Nev. 1948).
10 In Nevada, “[a]n action may be brought by any person against another who claims an estate or
11 interest in real property, adverse to the person bringing the action for the purpose of determining
12 such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require any
13 particular elements, but each party must plead and prove his or her own claim to the property in
14 question and a plaintiff’s right to relief therefore depends on superiority of title.” *Chapman v.*
15 *Deutsche Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and
16 citations omitted). Therefore, any person with a claimed interest in a property may bring a quiet
17 title action to obtain a declaration that his title is superior to that of other interest holders, and
18 may prove his claim by any valid legal theory, including the theories advanced by Plaintiff here.
19 The fact that Plaintiff did not own an interest in the Property at the time of the foreclosure sale is
20 not dispositive in determining the validity and priority of the interest Plaintiff presently claims.

21 Lastly, the arguments against Plaintiff’s procedural due process theory, set forth in the
22 motion to dismiss and LVDG’s joinder, are foreclosed by *Bourne Valley Court Tr. v. Wells*
23 *Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2296 (2017). In *Bourne*
24 *Valley*, the Ninth Circuit held that the “opt-in notice scheme” of NRS 116.3116—including in the

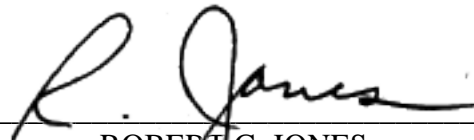
1 statute until its amendment in October 2015—was facially unconstitutional because it violated
2 the procedural due process rights of mortgage lenders. If the effect of a foreclosure under the
3 facially unconstitutional statute is to prevent the extinguishment of the first DOT, then Plaintiff's
4 predecessor-in-interest would have retained superior title to the Property following the HOA's
5 foreclosure in this case. This is a valid theory upon which Plaintiff asserts its quiet title claim.

6 Accordingly, the motion to dismiss the quiet title claim is denied.

7 **CONCLUSION**

8 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 48) is GRANTED IN
9 PART AND DENIED IN PART. Plaintiff's second cause of action for wrongful foreclosure is
10 DISMISSED WITH LEAVE TO AMEND within thirty days of this order's entry.

11 IT IS SO ORDERED.

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15 ROBERT C. JONES
16 United States District Judge

17 Dated: This 27th day of September, 2017.
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